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No. 883

In the Supreme Court of the United States

OCTOBER TERM, 1968

WALTER P. MACKIEWICZ and
FLORENCE B. MACKIEWICZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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No. 383

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FLORENCE B. MACKIEWICZ, PETITIONERS

v.

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Petitioners, husband and wife, were convicted after a trial by jury of attempted willful evasion of income taxes by the filing of false and fraudulent joint returns, in violation of Section 7201 of the Internal Revenue Code of 1954. The court of appeals affirmed.

1. The district court did not err in refusing to suppress oral statements made by Mr. Mackiewicz and documentary evidence given by him to Internal Revenue agents. *Miranda* v. *Arizona*, 384 U.S. 436, 444,

on which petitioners rely (Pet. 10-15), requires that warnings be given a person who "has been taken into custody or otherwise deprived of his freedom of action in any significant way * * *." Mr. Mackiewicz was not in custody and in no manner was deprived of his freedom of action when he provided the evidence in issue.

Although Mr. Mackiewicz was not advised of his right to counsel, he was told (Pet. 3a)—in his own home—that petitioners' "failure to report all their income for the years 1961 through 1963" was under investigation; and "that he was not required to respond to any questions or to furnish any records that he felt might be incriminating." (See, also, Pet. 6a.) Mr. Mackiewicz indicated that he understood his rights, answered the questions, and said that his books and records were at the agents' disposal. (R. 9-11, 24-25, 57-58; Pet. 6.)

Contrary to petitioners' claim that he was interviewed in a "compelling atmosphere," the district court found (Pet. 5a) that the statements were given "in a context devoid of any indication of coercion". The court of appeals agreed (Pet. 16a), and the evidence clearly justified that conclusion (R. 55-57, 74-75, 84-85).

The courts of appeals have uniformly rejected contentions that the full *Miranda* warning is required in such circumstances, and there is no reason for a different result here. See, *e.g.*, *Schlinsky* v. *United States*, 379 F. 2d 735 (C.A. 1), certiorari denied, 389 U.S. 920; *Spinney* v. *United States*, 385 F. 2d 908 (C.A. 1), certiorari denied, 390 U.S. 921; *United States* v. *Mancuso*, 378 F. 2d 612 (C.A. 4), certiorari

denied, 390 U.S. 955; *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[1] *United States* v. *Maius*, 378 F. 2d 716 (C.A. 6), certiorari denied, 389 U.S. 905; *United States* v. *Mansfield*, 381 F. 2d 961 (C.A. 7), certiorari denied, 389 U.S. 1015; *Frohmann* v. *United States*, 380 F. 2d 832 (C.A. 8), certiorari denied, 389 U.S. 976; *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[2]

2. We are aware of no authority for petitioners' contention (Pet. 14) that Mrs. Mackiewicz had a constitutional objection, separate and apart from her husband's claims under *Miranda*, with respect to the documentary evidence and oral statements which her husband gave to the agents. This evidence was not obtained from her, and there was no compulsion upon her to incriminate herself.[3]

Moreover, the record does not show, and Mrs. Mackiewicz does not here claim, the sort of interest in any of the papers that might entitle her to object to their

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[1] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States*, 377 F. 2d 585 (C.A. 5).

[2] There is nothing to the contrary (see Pet. 10, 12) in *Mathis* v. *United States*, 391 U.S. 1, which involved a taxpayer who was in custody in a State penitentiary when interviewed by a revenue agent.

[3] In the court of appeals, it was also contended that the testimony concerning the husband's oral statements was hearsay when used against the wife (Pet. 23a), but this contention is not included in the petition.

admission as evidence against her. As the court of appeals concluded (Pet. 19a, 20a), the agents obtained the various records and papers from a person—her husband—who had full authority to produce them. Some of the records were obtained by the agents from an accountant with her husband's permission (R. 24-25, 57-58). The rest were taken by Mr. Mackiewicz from a safe deposit box and shown by him to the agents (R. 17-21, 107-108). As the district court found (Pet. 7a):

> Husband and wife were joint lessees of the safe deposit box; the other records of Mrs. Mackiewicz had been unreservedly delivered to her husband, and no subsequent objections or limiting instructions were given by her when she learned that the records were to be examined for purposes of the joint tax return audit.

This case therefore does not remotely resemble the one Fourth Amendment case on which petitioners rely, *Stoner* v. *California*, 376 U.S. 483 (Pet. 15), which held that officers could not invade a hotel room without a warrant on the mere permission of a hotel clerk.

3. The common law rule, see *Hawkins* v. *United States*, 358 U.S. 74, forbidding one spouse to testify against the other did not give Mrs. Mackiewicz the right (see Pet. 15-18) to prevent admission as against herself of the testimony describing the statements her husband made during the investigation. In *Hawkins* this Court held only that it was error to permit a wife to appear as a witness against her husband in a criminal case. The Court did not consider the ex-

tent to which one spouse's extrajudicial statements made to third parties may be used against the other in a later trial.

The court below did reason that the goal of the exclusionary rule, the preservation of family harmony, see *Hawkins* v. *United States*, *supra*, would not have been served by excluding Mr. Mackiewicz's statements, since those statements evidently served to incriminate him just as much as his wife. However, because this was only an alternative ground for the court of appeals decision that the evidence was properly admitted as against the wife, the present case does not squarely raise the question that Mrs. Mackiewicz would tender. That alternative ground (Pet. App. 22a) was that Mr. Mackiewicz made the statements while "an implied agent for his wife." This conclusion is adequately supported by evidence showing that Mr. Mackiewicz was expected to deal and did deal with the Internal Revenue Service on behalf of both husband and wife with respect to all matters affecting the joint returns. Because the exclusionary rule clearly does not apply to statements that one spouse makes while acting as the other's agent, 8 Wigmore, *Evidence* (McNaughten ed. 1961) § 2232 (1), there is no need for the Court to consider the contention that there is a conflict with *Peek* v. *United States*, 321 F. 2d 934, 943 (C.A. 9), and *Olender* v. *United States*, 210 F. 2d 795, 800 (C.A. 9).[4]

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[4] *Peek* and *Olender* assume by way of dicta, but do not decide, that the exclusionary rule applies to extrajudicial statements. Each approves the admission of such statements at trial, *Peek* because of a waiver implied from the husband's

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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failure to interpose an objection during a joint interview with the FBI when his wife incriminated him, and *Olender* because of a failure to object at trial. *United States* v. *Winfree*, 170 F. Supp. 659 (E.D. Pa.), the other federal case relied on (Pet. 17), indicates that at the trial the wife's extrajudicial statements should not be admitted, but nevertheless refused to suppress evidence obtained from information voluntarily given by defendant's wife to investigators.

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